# A Look at State Supreme Courts: Religion and Education since *Engel v. Vitale*

Honors Research Thesis

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by

Corey Khan

The Ohio State University

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Project Advisor: Professor David L. Stebenne, Department of History

State supreme court cases involving religion and education since *Engel v. Vitale* for California, Ohio, and Virginia

| Name of Case | State | Year of Ruling | Issue/Topic |
|---|---|---|---|
| *California Educational Facilities Authority v. Priest* | California | 1974 | Public funds were going towards religious universities |
| *Rankins v. Commission on Professional Competence of Ducor Union School District* | California | 1979 | A school prevented a teacher from observing religious holidays |
| *California Teachers Association v. Riles* | California | 1981 | Public school textbooks were loaned to students at religious schools |
| *Sands v. Morongo Unified School District* | California | 1991 | A high school included a prayer in its graduation ceremony |
| *California Statewide Communities Development Authority v. All Persons Interested etc.* | California | 2007 | State had allowed religious schools to issue tax exempt bonds |
| *Protestants & Other Americans United for Separation of Church & State v. Essex* | Ohio | 1971 | Public funds were going towards religious schools |
| *State v. Whisner* | Ohio | 1976 | State educational standards violated religious liberties |
| *Simmons-Harris v. Goff* | Ohio | 1999 | School voucher program allowed public funds to be used at religious schools |
| *Freshwater v. Mount Vernon City School District Board of Education* | Ohio | 2013 | Teacher kept religious items in the classroom and taught creationism |
| *Miller v. Ayres* | Virginia | 1972 | Public funds used by students at religious colleges |
| *Miller v. Ayres* | Virginia | 1973 | Public funds used by students at religious colleges |
| *Habel v. Industrial Development Authority* | Virginia | 1991 | State bonds supplied funds for religious colleges |
| *Virginia College Building Authority v. Lynn* | Virginia | 2000 | State bonds supplied funds for religious colleges |

1. Introduction

The U.S. Supreme Court sparked immense public opposition in 1962 with its decision in the case *Engel v. Vitale*. The Court had ruled that school-sponsored prayer in public schools violated the First Amendment, even if it was a brief nondenominational prayer.[1] In addition to inciting widespread public backlash, the ruling prompted a question regarding the separation of church and state, and religious liberty more generally in America: did the First Amendment's Establishment Clause call for the government to refrain from *the realm* of religion, or did it simply require that the government be impartial *among* religions when involving itself in religious matters?

Since 1962, Americans have looked to the U.S. Supreme Court time and time again for a clear and consistent answer. While the Court has ruled on a number of cases that involve religion and schooling, and the separation of church and state more generally, it has not provided a clear, predictable doctrine on the issue. That situation has encouraged ever more litigation in that area of law before the U.S. Supreme Court. Simultaneously, state supreme courts have taken up the issue in their own cases. Scholarship on cases concerning the separation of church and state, however, has focused almost entirely on cases at the federal level.

By looking at cases involving religion and education that have come before three regionally representative state supreme courts— those of California, Ohio, and Virginia— this thesis will provide for a more thorough account of U.S. constitutional history in this area. An analysis of these state supreme court cases might additionally have prescriptive value, illustrating rulings and doctrines that have been effective and could be adopted on a federal level. By examining these issues at the state supreme court level, this research also aims to provide insight into the role and usefulness of state supreme courts in the U.S. judicial system. This can help

[1] "Facts and Case Summary - Engel v. Vitale." *United States Courts*.

academics and the public determine whether they ought to give greater consideration to state supreme courts as essential actors in U.S. constitutional history and effective instruments in resolving constitutional disputes.

2. State Supreme Courts in Academic Literature

When most Americans conceptualize their rights, they likely picture the U.S. Constitution, and alongside it the U.S Supreme Court, as the ultimate judicial protectors. Likewise, narratives of U.S. constitutional history often treat amendments to the U.S. Constitution and rulings by the U.S. Supreme Court as encompassing the whole story. When the Framers met in Philadelphia in 1787 to write what became the U.S. Constitution, however, they and the general public envisioned *state* supreme courts and *state* constitutions as the most important guardians of Americans' liberties.

Recent scholarship has called attention to this disparity, asserting the significance of state supreme courts and state constitutions in making U.S. constitutional history and their potential to resolve contemporary issues. In his book *51 Imperfect Solutions: States and the Making of American Constitutional Law*, U.S. Court of Appeals Judge Jeffrey Sutton writes that "virtually all of the foundational liberties that protect Americans originated in the state constitutions."[2] Judge Sutton provides accounts of different issues in U.S. constitutional history. In all cases, he describes state supreme courts as important actors in U.S. constitutional history. He also claims that the U.S. judicial system would be more effective at meeting the needs of the public if people began looking more towards state supreme courts and constitutions for solutions, rather than the U.S. Supreme Court and Constitution.

[2] Sutton, Judge Jeffrey. *51 Imperfect Solutions: States and the Making of American Constitutional Law*. Oxford University Press, 2018. pp.1.

In his view, many of the constitutional issues debated today would be better dealt with by having solutions first developed at the state level. He claims that this would allow any issues that arise from judicial decisions or constitutional amendments to be resolved by states before being implemented at the national level. Furthermore, he explains that starting at the state level allows for experimentation: different state supreme courts will come up with their own solutions, providing a number of judicial remedies for federal courts to consider. This conception of the states as laboratories has long been popular among political scientists.[3] Additionally, state supreme courts, he argues, can craft decisions that are more tailored to their state's population—a factor he views as significant, given the significant state and regional diversity of the country.[4]

Judge Sutton is not alone in his belief that state supreme courts should be looked to more often. In her book *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights*, Dr. Emily Zackin, a political historian, writes that state constitutions and state supreme courts have been the sources of some of the most important social reforms in American history. She further argues that current progressive concepts, such as the right to a living wage or the right to certain educational opportunities, will be best realized in state constitutions and state supreme courts. [5]

These works, among others, make a compelling argument for giving more consideration to state supreme courts in the study of U.S. constitutional history and the pursuit of judicial solutions. Their central premise—that a greater emphasis on state supreme courts would enhance the judicial system— has not, however, been thoroughly scrutinized. While a full investigation

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[3] Shipan, C., & Volden, C. (2008). The Mechanisms of Policy Diffusion. *American Journal of Political Science, 52*(4), 840-857. Retrieved April 2, 2021, from http://www.jstor.org/stable/25193853
[4] Sutton, Judge Jeffrey. *51 Imperfect Solutions*. pp. 2-5.
[5] Zackin, Emily J. *Looking for Rights in All the Wrong Places: Why State Constitutions Contain Americas Positive Rights*. Princeton University Press, 2013.

into the merits of their views would be of extraordinary scope, a focused analysis on a particular and important issue in U.S. constitutional history can still provide useful insight.

Through an examination of how state supreme courts have dealt with cases involving religion and schooling since *Engel v. Vitale*, this thesis will assess whether federalism works better as a guiding principle in addressing such cases. Additionally, it will comparatively assess state supreme courts, observing whether certain courts and regions are more innovative than others or more prone to protecting individual rights. In creating an account of religion and education cases at the state level, this analysis will also contribute to a more comprehensive view of U.S. constitutional history in this area.

3. Methodology and Sources

This thesis will assess the value of state supreme courts by analyzing the history of religion and schooling at the state level, since *Engel v. Vitale*. This area of U.S. constitutional history is well suited for this purpose because it is not decidedly divided along political party lines. Cases involving issues such as the right to an abortion or the right to possess a firearm would likely, in contrast, be more cleanly split between states based on their majoritarian political ideology. While cases involving religion and education have likely been affected by political ideology, the variance in religious populations among states suggests more idiosyncratic judicial solutions can be expected on this issue. This also presents an opportunity to observe whether state supreme courts have tailored their decisions on this issue to their distinctive populations.

The ambiguity in the U.S. Supreme Court's separation of church and state doctrine also makes this issue ideal. Amid this federal ambiguity, one can observe whether state supreme courts have come up with their own solutions and whether these solutions have informed rulings

at the federal level. Consequently, the state supreme court proponents' claim—that state supreme courts will experiment with different judicial remedies and provide insight to federal courts—can be scrutinized.

Another reason for examining cases concerning religion and schooling, and the separation of church and state more generally, is that they are ongoing. These issues have continued to come before the U.S. Supreme Court since *Engel v. Vitale*, and though they have evolved over the years, the debate over the meaning of the Establishment Clause in the First Amendment continues. Therefore an analysis of this historical issue, one which looks towards activity at the state level, might offer some insight into how this area of U.S. constitutional history will develop going forward.

The states that will be used for this analysis— California, Ohio, and Virginia —provide political and regional variance; they also each offer several cases involving religion and schooling issues. Their state supreme courts will be evaluated based on how many cases of the same nature have arisen. If several cases involving religion and schooling issues came before a court, for example, and each time the legal questions at play were similar, then that suggests the court had not been clear in establishing a doctrine on the issue.

Furthermore, the state supreme courts will be evaluated with regards to their consistency—whether their rulings are based on a coherent rationale or whether their rulings seem more ad hoc. These same standards will be applied to the cases involving religion and education that have come before the U.S. Supreme Court. This will allow for both a comparison among state supreme courts and a comparison between state supreme courts and the U.S. Supreme Court. The courts that have been more consistent and clear in their rulings will be regarded as more successful in resolving this constitutional dispute. This will allow for an

assessment of whether state supreme courts have filled in the gaps left by the U.S. Supreme Court on this issue. Likewise, it will also offer insight into whether any of the judicial remedies crafted by state supreme courts can inform rulings at the federal level.

Additionally, the state supreme court proponents' argument is a normative one: a greater emphasis on state supreme courts will lead to a *better* judicial system. This can simply mean a judicial system that has greater consistency and clarity in its judicial rulings, but a better judicial system would, evidently, also better serve the public. One way to try and take this into account is by examining instances in which judicial rulings on religion and education issues have incited protests or prompted legislative backlash. Such evidence would indicate that a court's judicial ruling did not satisfy the public, which might suggest the judicial remedy was unfavorable.

This thesis will begin with an introductory overview that gives context to the issues surrounding state supreme court cases concerning religion and education, mainly using secondary sources. This will include a discussion of the major U.S. Supreme Court cases in this area, from *Engel v. Vitale* to the present. It will also include some discussion of the broader political climate surrounding church and state relations cases. One source that will be used for contextualizing *Engel v. Vitale* is Bruce Dierenfield's book, *The Battle Over School Prayer*. The book examines *Engel* closely, including interviews with the parties involved in the case, historicizing the case facts, and explaining the legal components of the case and how the U.S. Supreme Court arrived at its decision.[6]

Additionally, James W. Fraser's book, *Between Church and State: Religion and Public Education in a Multicultural America*, discusses U.S. Supreme Court cases involving religion and public schools since *Engel*. The book looks at these cases as part of a broader church and

[6] Dierenfield, Bruce J. *The Battle over School Prayer: How Engel v. Vitale Changed America*. Lawrence, KS: University Press of Kansas, 2007.

state relations issue, discussing debates over prayer, creationism, and voucher programs as they relate to public education. Steven Waldman's book, *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*, also offers a useful background for church and state relations in America. It is particularly helpful in supplying information about the role non-Christian religions have played in church and state issues generally and in public education issues more specifically.[7]

Other sources that will assist with contextualization include Steven Jones's book, *Religious Schooling in America*, which breaks down the distinction between private and public education and how it is importantly related to the issues of religion and schooling.[8] Robert Alley's book, *School Prayer: The Court, the Congress, and the First Amendment*, contains many useful materials as well. It has, for example, transcripts from Senate and House committee hearings and debates that were in response to U.S. Supreme Court decisions on cases involving church and state relations issues.[9] The book *Religion and the Law: A Dictionary* by Christopher Anglim will also be a useful source, as it provides descriptions of all cases that have come before the U.S. Supreme Court in which religion was a central issue and contains information regarding legal concepts that are important for understanding these cases.[10]

Once this overview is finished, primary source materials will be used to create a historical account of the cases involving religion and schooling that have come before state supreme courts in California, Virginia, and Ohio. Principal primary sources for this account include the state supreme courts' various rulings in these cases. Materials available from a case, such as transcripts of interviews with the parties involved or briefs submitted to the court, will

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[7] Waldman, S. (2020). *Sacred Liberty: America's long, bloody, and ongoing struggle for religious freedom*. San Francisco: Harper One.
[8] Jones, S. L. (2008). *Religious schooling in America: Private education and public life*. Westport, CT: Praeger.
[9] Alley, R. S. (1996). *School prayer: The Court, the Congress, and the First Amendment*. Buffalo, NY: Prometheus Books.
[10] Anglim, C. (1999). *Religion and the law: A dictionary*. Santa Barbara: ABC-Clio.

also be used. Newspaper and journal articles about a case, if available, will also help to construct the historical narrative. Other important source materials will pertain to the state supreme court justices who decided the case, particularly how they were selected and retained. Data that provides insight into each state population's religious makeup will also be used for context.

4. Overview of the State Supreme Court Cases

There are five cases involving religion and schooling that have come before the Supreme Court of California since *Engel v. Vitale*. Each one of them will be examined. The first one is *California Educational Facilities Authority v. Priest*, which was decided in 1974. The case involved the California Educational Facilities Authority Act, which allowed public funds to go to private universities. The question before the Supreme Court of California was whether this would entangle the state government with religion, in violation of the U.S. Constitution and the California Constitution, since some private universities had religious affiliations.[11] The second case concerning religion and schooling that came before the Supreme Court of California was *Rankins v. Commission on Professional Competence of Ducor Union School District*, which was decided in 1979. This case involved a school teacher who requested that his absences on religious holidays that he observed be permitted. When the school district denied his request, he sued, claiming that his religious liberties had been violated. In making his argument, the teacher also claimed that there had been a breach of the First Amendment's Establishment Clause.[12]

The third case that will be examined for California is *California Teachers Association v. Riles*, which was decided in 1981. The case involved the constitutionality of a statute which allowed the state to lend textbooks to students who were not attending public schools—

[11] California Educational Facilities Authority v. Priest, 12 Cal. 3d 593, 526 P.2d 513, 116 Cal. Rptr. 361, 1974 Cal. LEXIS 248 (Supreme Court of California September 25, 1974 ).
[12] Rankins v. Comm'n on Prof'l Competence of Ducor Union Sch. Dist., 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, 1979 Cal. LEXIS 249, 19 Fair Empl. Prac. Cas. (BNA) 925, 19 Empl. Prac. Dec. (CCH) P9234 (Supreme Court of California April 30, 1979 ).

including those attending private, religious schools.[13] The fourth case is *Sands v. Morongo Unified School District*, and it was decided ten years later, in 1991. A public high school had included prayers as part of its graduation ceremony. The prayers had not been directed towards any particular religion. At issue was whether this practice violated the First Amendment's Establishment Clause.[14]

The fifth and latest case involving religion and schooling to come before the Supreme Court of California is *California Statewide Communities Development Authority v. All Persons Interested etc.*, which was decided in 2007. The state had allowed religious schools to issue bonds that were tax exempt so that they could develop their campus facilities. At issue was whether this violated the Establishment Clause.[15]

There are four cases involving religion and schooling that have come before Ohio's Supreme Court since *Engel.* The first is *Protestants & Other Americans United for Separation of Church & State v. Essex*, which came before the Court in 1971. At issue was the constitutionality of a bill that granted money to religious schools.[16] The Supreme Court of Ohio later ruled on the case *State v. Whisner* in 1976. Parents of a child who attended a private religious school had been sanctioned by Ohio, which alleged that the school did not meet the State's minimum education standards. In turn, the parents sued the State, claiming that the education standards had violated their religious liberties.[17]

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[13] Cal. Teachers Ass'n v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300, 1981 Cal. LEXIS 172 (Supreme Court of California August 27, 1981 ).
[14] Sands v. Morongo Unified School Dist., 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34, 1991 Cal. LEXIS 1724, 91 Daily Journal DAR 5389, 91 Cal. Daily Op. Service 3328 (Supreme Court of California May 6, 1991 ).
[15] California Statewide Communities Development Authority v. All Persons Interested etc., 40 Cal. 4th 788, 152 P.3d 1070, 55 Cal. Rptr. 3d 487, 2007 Cal. LEXIS 1914, 2007 Daily Journal DAR 2998, 2007 Cal. Daily Op. Service 2368 (Supreme Court of California March 5, 2007, Filed ).
[16] Protestants & Other Americans United for Separation of Church & State v. Essex, 28 Ohio St. 2d 79, 275 N.E.2d 603, 1971 Ohio LEXIS 412, 57 Ohio Op. 2d 263 (Supreme Court of Ohio November 24, 1971, Decided ).
[17] State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750, 1976 Ohio LEXIS 686, 1 Ohio Op. 3d 105 (Supreme Court of Ohio July 28, 1976, Decided ).

In the third case, *Simmons-Harris v. Goff*, an appropriations bill passed by the Ohio legislature in 1995 was challenged before Ohio's Supreme Court in 1999. The bill contained a school voucher program, which provided funding for students to attend private religious schools. Consequently, one of the central issues of the case was whether the Establishment Clause had been violated.[18]

The most recent case involving religion and schooling in Ohio is *Freshwater v. Mount Vernon City School District Board of Education*, which came before the Court in 2013. A teacher kept a Bible in his desk and had placed other religious paraphernalia around his classroom. He was asked by the principal to remove all of these religious items, and when he refused, he was fired. At issue was whether his religious liberties had been violated and whether his placement of religious items in the classroom constituted a violation of the Establishment Clause.[19]

There are four cases concerning religion and schooling that have come before Virginia's Supreme Court since *Engel*. The first two cases, *Miller v. Ayres* (1972) and *Miller v. Ayres* (1973), pitted the State's Attorney General against its Comptroller. They both involved state legislation that provided financial aid to students attending religious colleges; a central issue in both cases was whether this violated the Establishment Clause.[20] [21] In 1991, Virginia's Supreme Court considered a similar issue in *Habel v. Industrial Development Authority*. A city had issued bonds to supply funds to a religious college in the area. Consequently, the question of whether this violated the Establishment Clause came before the Court.[22] The most recent case to come

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[18] Simmons-Harris v. Goff, 86 Ohio St. 3d 1, 1999-Ohio-77, 711 N.E.2d 203, 1999 Ohio LEXIS 1893 (Supreme Court of Ohio May 27, 1999, Decided ).
[19] Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ., 137 Ohio St. 3d 469, 2013-Ohio-5000, 1 N.E.3d 335, 2013 Ohio LEXIS 2685, 37 I.E.R. Cas. (BNA) 328, 2013 WL 6067987 (Supreme Court of Ohio November 19, 2013, Decided).
[20] Miller v. Ayres, 213 Va. 251, 191 S.E.2d 261, 1972 Va. LEXIS 344 (Supreme Court of Virginia September 1, 1972 ).
[21] Miller v. Ayres, 214 Va. 171, 198 S.E.2d 634, 1973 Va. LEXIS 277 (Supreme Court of Virginia August 30, 1973 ).
[22] Habel v. Industrial Dev. Authority, 241 Va. 96, 400 S.E.2d 516, 1991 Va. LEXIS 5, 7 Va. Law Rep. 1334 (Supreme Court of Virginia January 11, 1991 ).

before Virginia's Supreme Court is *Virginia College Building Authority v. Lynn*, which was decided in 2000. A state building authority had given bonds to a private religious university, per Virginia's Educational Facilities Authority Act. The issue before the Court was whether the Act constituted a violation of the Establishment Clause.[23]

In addition to these cases, other cases regarding the Establishment Clause outside the realm of education that have come before the three state supreme courts will be noted. Though such cases do not directly pertain to issues concerning religion and schooling, they may further contextualize the development of each state's church and state doctrine.

5. Religion and Education Cases in the U.S. Supreme Court: From *Engel* to the Present

In 1947, the U.S. Supreme Court ruled in the case *Everson v. Board of Education* that the Establishment Clause of the First Amendment applied to the states.[24] Prior to this ruling, the Establishment Clause only applied to the federal government; the *Everson* decision meant the Supreme Court could now rule on whether state laws were constitutional with regards to the Establishment Clause. This opened the door for the Court to start developing its separation of church and state doctrine—the case *Engel v. Vitale* would be a major step in starting that development.

The case involved a New York state school prayer, which the New York Board of Regents had decided to adopt in 1951. At the time, the national juvenile crime rate was increasing, and the first baby boomers turned five in 1951, which marked the beginning of a trend towards greater numbers of children in the public school system. Furthermore, stories of government wrongdoing had become widespread as the country, provoked by Congress, began to

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[23] Virginia College Bldg. Auth. v. Lynn, 260 Va. 608, 538 S.E.2d 682, 2000 Va. LEXIS 147 (Supreme Court of Virginia November 3, 2000).

[24] *Everson v. Board of Education* (February 10, 1947). https://tile.loc.gov/storage-services/service/ll/usrep/usrep330/usrep330001/usrep330001.pdf

root out communist sympathizers in government, and the news broke stories of low level malfeasances by some Truman Administration officials. The new school prayer, the Board hoped, would help foster moral training in the New York City public school system. The prayer was carefully construed. It left out any explicit Christian reference and thus was deemed "nondenominational," although it did reference a singular God, and used the adjective "Almighty," which had theological implications that not all believers accepted. Schools were allowed to decide whether to use the prayer, and students could choose not to participate in it.[25]

The plaintiff who would initiate the eventual case *Engel v. Vitale* was a non-practicing Jew named Lawrence Roth. As a child, Roth had felt like an outcast in his predominantly Christian school and had grown up dealing with anti-Semitic remarks. It was important to him, therefore, that religion and public schools exist in two distinct spheres, and he took an active role in his children's education. Roth had long been upset that his children's public school engaged in Christmas celebrations, involving Christmas trees, Christmas music, and parties; when his school district chose to recite the New York state prayer at the beginning of classroom instruction in 1958, Roth decided that that was the last straw. He contacted the American Civil Liberties Union (ACLU), which had received complaints about the prayer for some time, but had never found an individual willing to serve as a plaintiff for a lawsuit due to the public hostility such a person might face. Lawrence Roth would not be turned away so easily. He agreed to serve as a plaintiff and was represented by an ACLU attorney named William Butler, who himself was Jewish. Butler wanted a religiously diverse array of plaintiffs for the case, and Roth began recruiting those he knew. Among those recruited was one of Roth's neighbors, Steven Engel. Engel was a

[25] Dierenfield 67-68.

Jewish man who felt that prayer was sacred and personal, and he believed that making prayer a habitual school practice would diminish it.[26]

William Vitale, the president of the school board, would serve as the defendant in the case. The plaintiffs argued that the school prayer violated the Establishment Clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion."[27] Since the government had composed the prayer and public schools had promoted its use, the plaintiffs argued that the prayer constituted an unlawful entanglement of government and religion. The defendants, on the other hand, argued that the Establishment Clause was meant to prevent the government from establishing a state church, and therefore the school prayer was constitutional, because it did not privilege any specific religious denomination. They added, furthermore, that schools had not been forced to use the prayer and that students in schools that did had not been forced to pray.

On its way to the U.S. Supreme Court, the plaintiffs lost every time; the lower courts sided with the defendants, reasoning that the prayer was constitutional since it did not endorse a particular religious sect, did not constitute part of classroom instruction, and students were not forced to participate in it. Eventually the U.S. Supreme Court agreed to hear the case. In their briefs for the Court, the plaintiffs shifted the focus of their argument, emphasizing that the prayer was unlawfully sectarian since it favored the beliefs of theists over atheists, and since its reference to a singular God favored some thesists over others. The school board, in rebuttal, argued that the U.S. Constitution did not exclude prayer nor religion from public life altogether.

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[26] Dierenfield 92-95.

[27] "U.S. Constitution - First Amendment: Resources: Constitution Annotated: Congress.gov: Library of Congress." Constitution Annotated. https://constitution.congress.gov/constitution/amendment-1/.

Furthermore, the school board argued that the prayer was voluntary and did not subject students to formal religious teaching, and that therefore the First Amendment had not been violated.[28]

On June 25th, 1962, the U.S. Supreme Court ruled in favor of the plaintiffs in a vote of six to one, (one Justice was hospitalized and unable to vote, while another had just been confirmed to the Court and had not participated in hearing this dispute). Justice Hugo Black wrote the opinion for the Court, stating that the prayer did in fact constitute an unconstitutional establishment of religion. In the ruling the Court interpreted the First Amendment to mean that government could not sponsor religious activity, regardless of whether that religious activity did or did not favor a particular religious sect— a question deemed irrelevant in the Court's decision. Additionally, it did not matter that the prayer was voluntary since, the Court argued, coercion was not required for a violation of the Establishment Clause. Government *sponsorship* of religion, alone, was enough to violate the Establishment Clause, and the fact that the prayer was composed by government and carried out by government was sufficient to consider the school prayer unconstitutional.[29] [30]

Through its ruling, the U.S. Supreme Court created more issues than it solved. For instance, the sole dissenting voice on the Court, Justice Potter Stewart, questioned how the Court could deem the prayer unconstitutional when the justices themselves began each session with a prayer. The full lyrics to the national anthem, moreover, contain references to a singular deity, as does U.S. currency, the Declaration of Independence, and the revised Pledge of Allegiance, which regular school students had been reciting daily since 1954, when the words "under God" were added. Where would the Court draw the line? [31]

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[28] Dierenfield 116-121.
[29] *Engel v. Vitale* (June 25, 1962) https://tile.loc.gov/storage-services/service/ll/usrep/usrep370/usrep370421/usrep370421.pdf
[30] Dierenfield 130.
[31] *Engel v. Vitale*.

In addition to these seeming logistical and philosophical inconsistencies, the decision in *Engel v. Vitale* prompted a fierce public backlash. Several congressional leaders, senators, cardinals, and religious figures like Billy Graham, made public statements criticizing the ruling and claiming that the U.S. Supreme Court was attempting to drive God out of public life. In many states, new billboard signs calling for the impeachment of Chief Justice Earl Warren were put up. Less than a month after the decision, the Senate decided to hold hearings on the Court's decision, and subsequently debated five proposed amendments to the U.S. Constitution. These amendments would essentially have overturned the ruling in *Engel v. Vitale*, sanctioning school-sponsored prayer as well as protecting Bible reading in schools. Though these proposals did not gain the two-third supermajority needed to send the amendment to the states, they did illustrate the deep public dissatisfaction that arose from the *Engel v. Vitale* ruling.[32]

The U.S. Supreme Court similarly interpreted the Establishment Clause in the First Amendment a year later in 1963. In that year it ruled on two cases together, *Abington School District v. Schempp* and *Murray v. Curlett*. The cases involved public schools leading students in Bible reading and reciting the Lord's Prayer in Pennsylvania and Maryland, respectively. Fundamentally the arguments made were similar to those made in *Engel v. Vitale*. The plaintiffs asserted that the schools' practices were an unconstitutional establishment of religion. The defendants, on the other hand, claimed that the practices were not primarily religious, rather they were practices aimed at instilling morality, which happened to use religious elements. Surely, they reasoned, a practice was not unconstitutional simply because it involved religious materials. Additionally the defendants, like the defendants in *Engel*, emphasized that students had not been forced to participate in the Bible reading and the recitation of the Lord's Prayer.[33]

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[32] Alley 107-120.
[33] Dierenfield 167-176.

The U.S. Supreme Court sided with the plaintiffs, ruling in an eight to one decision that school Bible reading and recitation of the Lord's Prayer violated the Establishment Clause. In the opinion for the Court, Associate Justice Tom Clark attempted to reduce public resentment and outline the Court's vision for church and state relations. The ruling, he asserted, did not dismiss the importance of including religious study in one's education, and did not object to studying the historic or literary importance of religious materials in schools as part of a secular education. The Court also introduced a two-part test for whether a practice was constitutional with regards to the Establishment Clause: it must have a secular purpose, and its primary effect cannot be to further religion or to hinder it.[34] [35]

Similar to the ruling in *Engel v. Vitale*, this ruling prompted strong public reactions. Many religious and political figures opposed the decision, and once more, the Senate Judiciary Committee met to discuss the cases and propose amendments to overturn the Court's decision. One noteworthy fact is that many Americans who rebuked the Court's decisions in these years lived in states that did not have prayer or Bible reading in their school systems.[36] There is a possibility, therefore, that these Americans were pacified or content when these kinds of decisions were made at the state level; a consistent absence of strong public sentiment after similar state supreme court rulings on this issue might suggest this is the case.

In 1968 the U.S. Supreme Court further expanded its doctrine with regards to church and state issues with its ruling in *Epperson v. Arkansas*. The case touched on a particular issue in religion and public education— the teaching of evolution and creationism. A biology teacher in Arkansas, Susan Epperson, challenged an old 1928 state law that forbade the teaching of

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[34] *Abington School District v. Schempp* (June 17, 1963) https://tile.loc.gov/storage-services/service/ll/usrep/usrep374/usrep374203/usrep374203.pdf
[35] Fraser 149.
[36] Alley 120-127.

evolution in public schools. The Arkansas State Supreme Court upheld the law, ruling that it was within the state's power to choose the public school curriculum. The U.S. Supreme Court, however, ruled in favor of Epperson, reasoning that the law was enacted for a religious purpose, that purpose being the prohibition of a theory viewed as antagonistic to religion, and therefore it violated the Establishment Clause.[37] Through this ruling the Supreme Court continued a consistent interpretation of the Establishment Clause— one that required a strict separation between church and state.

The Court continued this precedent in *Lemon v. Kurtzman* in 1971. This case involved a Pennsylvania law that provided funding for private schools, most of which were Catholic. In an eight to one decision the Supreme Court struck down the law, ruling that it had violated the Establishment Clause. It also presented a test for whether a law violated the Establishment Clause that built upon its *Schempp* decision: it must have a secular purpose, its primary effect cannot be to further religion or to hinder it, *and* it cannot create "an excessive government entanglement with religion." [38] [39]

Through its decision, the Court expanded its developing separation of church and state doctrine to school funding programs. Like its previous rulings, the Court called once more for a strict separation between church and state—and, once more, in an almost unanimous decision. Thirteen years later, in 1984, the Supreme Court ruled in the case *Lynch v. Donnelly*, where the vote was more contentious. The case involved a municipality in Rhode Island which erected nativity scenes of Jesus during the month of December; at issue was whether this constituted an unconstitutional establishment of religion. Prior to reaching the U.S. Supreme Court, the District

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[37] Fraser 159-161.
[38] *Lemon et al. v. Kurtzman et al.* (June 28, 1971). https://tile.loc.gov/storage-services/service/ll/usrep/usrep403/usrep403602/usrep403602.pdf
[39] Waldman 204.

Court and Court of Appeals had ruled that the municipality's display of the nativity scene was unconstitutional. In a five to four ruling, the U.S. Supreme Court reversed these decisions, asserting that this practice did not violate the Establishment Clause. The Court argued that there had not been excessive entanglement of government and religion, since the cost of putting up the nativity scene was negligible and municipal officials had not worked with church authorities. The Court noted, furthermore, that while the previous 'tests' it created were helpful, the Court was not bound to them. Perhaps most intriguing, the majority held that the nativity display *did* have a secular purpose and did not unconstitutionally advance religion. The purpose, the majority argued, was to celebrate a holiday and national tradition recognized by Congress and to depict the origins of the holiday. The dissenting justices argued that if the purpose of the practice was secular, it could have been done without such an explicitly religious symbol. Furthermore the practice, they asserted, clearly showed government support of one religion over others. Therefore, they believed the Establishment Clause had surely been violated.[40]

This case marked a clear shift from the Court's prior near-unanimous separation of church and state rulings. It also indicated a turn from its more absolutist interpretation of the Establishment Clause to a more limited one. After all, the Court's reasoning in *Lynch v. Donnelly* would arguably have found the laws in *Engel* or *Schempp* constitutional, which had stated secular purposes of fostering moral instruction and national unification in the midst of the Cold War and increasing crime rates.

The U.S. Supreme Court further developed its Establishment Clause interpretation in *Board of Education of Westside v. Mergens*. This case involved the Equal Access Act of 1984, which allowed students to participate in religious clubs, such as Bible reading groups, in public

[40] *Lynch et al. v. Donnelly et al.* (March 5, 1984). https://tile.loc.gov/storage-services/service/ll/usrep/usrep465/usrep465668/usrep465668.pdf

schools after regular instruction had ended. The statute had been designed under the Reagan Administration, and it shifted the conservative focus from school prayer to this more widely acceptable idea. Prominent Christian Conservative leader Jerry Falwell stated, for example, that "we could not win on school prayer, but equal access gets us what we want." [41] Although the Bill's purpose might have been religious for some of its supporters, it was seemingly secular in form, since it simply called for federally funded schools to provide equal accommodations to extracurricular student groups.

When students in a Nebraskan school were prevented from forming a Bible study club, they sued, and in 1990 the U.S. Supreme Court confronted the question of whether the practice of hosting religious clubs in schools violated the Establishment Clause. In an eight to one decision the Court ruled that it did not, reasoning that the statute had a clear secular purpose and that its primary aim was not to advance religion. Furthermore, it did not constitute an unconstitutional entanglement between government and religion, the Court ruled, since the school was not sponsoring the religious group, rather it was providing them accommodation as it had with secular student groups. The Court's decision was a win for the religious right, and it demonstrated the Court's continued use of the three-part 'test' it had developed in *Lemon*.[42]

In 1992 the George H. Bush Administration had an opportunity to further rein in the strict separation of church and state doctrine that the U.S. Supreme Court had established in *Engel*. A non-practicing Jewish man named Daniel Weisman had been offended that his children's school graduation ceremony involved a ceremonial prayer led by clergy that called on attendees to show their gratitude to Jesus Christ. When Weisman asked for the school to stop using the prayer, the principal replaced the prayer with one that was "nondenominational," although in substance it

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[41] Dierenfield 199.
[42] *Board of Education of the Westside Community Schools et al. v. Mergens et al.* (June 4, 1990). https://tile.loc.gov/storage-services/service/ll/usrep/usrep496/usrep496226/usrep496226.pdf

was similar to the prayer used in *Engel*. Weisman wanted the prayer removed altogether, and he sued the school. The fact that there was a presidential election in 1992 heightened the stakes of the case for both political parties as it made its way to the Supreme Court. U.S. Solicitor General Kenneth Starr and Justice Department attorneys, including John Roberts who would go on to serve as Chief Justice on the Supreme Court, argued that the Court should interpret the Establishment Clause as prohibiting the favoring of one religion over another and the compulsion of religious activity. However, they also noted that this case was different from *Engel*. A classroom is an instructional environment, whereas a graduation ceremony was celebratory; therefore, they argued, the students were not coerced to participate in the prayer as they had been in *Engel*.[43]

In its five to four decision on *Lee v. Weisman*, the Supreme Court ruled in favor of Weisman. Justice Anthony Kennedy had been the deciding vote and wrote the opinion for the Court. Like its ruling in *Engel*, the Court decided that the prayer violated the Establishment Clause, since it had been composed and given under the direction of the school. Unlike its ruling in *Engel*, the Court emphasized the fact that coercion of religious activity violated the Establishment Clause, and that this was central to the case. Kennedy disagreed with the defendants that a graduation ceremony's environment made the prayer non-coercive; while it was true that students could choose not to attend the ceremony, this was not an acceptable accommodation for them, Kennedy wrote, given the social importance of graduation ceremonies.[44]

Through its decision the Supreme Court continued to hold that school-led prayer violated the Establishment Clause, but now by a far closer margin than it had before and by using a

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[43] Dierenfield 204.
[44] *Lee et al. v. Weisman* (Jne 24, 1992). https://tile.loc.gov/storage-services/service/ll/usrep/usrep505/usrep505577/usrep505577.pdf

different test— one that looked more to the level of coercion. As for public opinion, the ruling continued a pattern of strong dissatisfaction with the Court's Establishment Clause interpretation. Congressman Ernest Istook (R-OK), for example, proposed the Istook Amendment a few years later. The Amendment would re-interpret the First Amendment as more protective of religion in public spheres, and it specifically protected prayer in public schools. Although the Amendment did not gain the two-third vote needed to pass the House, it did have the support of a majority of representatives.[45] Additionally, a question remained for the Court: if the Court's ruling was that government support of religion was unconstitutional— not just government support of a particular religion over others— then did references to God in the Pledge of Allegiance, or in other government composed or directed forms, also violate the Establishment Clause?

In 2004, the U.S. Supreme Court would have a chance to answer that question in the case *Elk Grove Unified School District v. Newdow*. The case involved an atheist named Michael Newdow, who sued his daughter's school for leading students in saying the Pledge of Allegiance. Newdow was troubled by the phrase "one nation under God," and he believed it violated the Establishment Clause. The U.S. Court of Appeals for the Ninth Circuit had ruled in favor of Newdow, deciding that the phrase did violate the Establishment Clause. Before the case reached the Supreme Court, however, there was an immense show of public disapproval regarding the Ninth Circuit's ruling. In addition to rebukes from many religious leaders, members of Congress on both sides of the aisle expressed their opposition to the decision. The House of Representatives passed a resolution opposing the ruling by a margin of 416 to 3 and many members further protested it by reciting the Pledge of Allegiance on the Capitol steps. The

[45] Dierenfield 206-207.

Senate also expressed disapproval with the decision, passing a resolution affirming support for the Pledge's phrasing by a unanimous vote.[46]

Whether or not this strong public disapproval influenced the Supreme Court is unclear; it is clear, however, that the majority of the Court refused to answer the case's underlying constitutional question. Five members of the Court reversed the Ninth Circuit's decision, but only on a technicality. Although Michael Newdow shared custody of his daughter with her mother, the mother had been given sole legal custody of the daughter at the time Newdow filed the case. The five ruled that as a noncustodial parent, Michael Newdow did not have standing in federal court. The three other justices also ruled to reverse the Ninth Circuit's decision, but they held that Newdow did have standing. Therefore, they decided to answer the constitutional question of whether the phrase "one nation under God" violated the Establishment Clause.[47]

All three dissenting justices, (one, Associate Justice Antonin Scalia, had recused himself from the case after publicly commenting on it earlier), wrote that the phrasing in the Pledge was constitutional. They all agreed, however, for different reasons. Chief Justice Rehnquist wrote that the phrasing was constitutional because the Pledge was expressing allegiance to the U.S., and the few words which referenced God could hardly be taken as an establishment of religion; rather in context, he argued, it was simply an expression of the nation's historical heritage. Justice Sandra Day O'Connor, in contrast, pursued an "endorsement test," which considered whether a law or practice constituted government endorsement of religion. In this case, she wrote, it did not. Justice Clarence Thomas, on the other hand, argued that the Establishment Clause only applied to the federal government, not the states— effectively disagreeing with the Court's ruling in

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[46] With, David Stout. "Congress Defiant Over Ban on Pledge of Allegiance." The New York Times. June 27, 2002. https://www.nytimes.com/2002/06/27/national/congress-defiant-over-ban-on-pledge-of-allegiance.html.
[47] *Elk Grove Unified School District et al. v. Newdow et al.* (June 14, 2004). https://tile.loc.gov/storage-services/service/ll/usrep/usrep542/usrep542001/usrep542001.pdf

*Everson*. He also believed the phrasing in the Pledge of Allegiance could not be considered "coercive" in the way the Court had used the term in prior decisions. Additionally, all three dissenting justices agreed— the majority had used "a novel… standing principle in order to avoid reaching the merits of the constitutional claim." Each also expressed frustration and disagreement with the Court's past rulings on Establishment Clause issues.[48]

Recent cases outside the realm of education demonstrate the ongoing debate over the Establishment Clause. In 2005, the Court ruled on two very similar cases in the opposite manner. In the case *McCreary County v. American Civil Liberties Union of Kentucky*, copies of the Ten Commandments had been displayed in a public school and a few courthouses. The Court ruled that these displays violated the Establishment Clause, since they served a religious purpose and no secular purpose was apparent. The Court was split, however, five to four on the decision. The dissenting opinion reasoned that the Establishment Clause restricted favoring one religion over another, not favoring religion over secularization. Furthermore, the Ten Commandments display did not favor one religion over another, the dissenting justices reasoned, since nearly all Americans were Christian, Jewish, or Muslim, and each of those religions recognized the Ten Commandments.[49]

In contrast, the Court ruled five to four in the case *Van Orden v. Perry*, on the same day of its *McCreary* decision, that a Ten Commandments monument at the Texas State Capitol did not violate the Establishment Clause. The difference in the Court's decision came from the fact that Justice Stephen Breyer, this time, joined with the 4 dissenters from *McCreary County*. The opinion in this case emphasized the historical importance of the Ten Commandments and the context within which the monument was put up. It had been donated, for instance, by the Texas

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[48] *Elk Grove Unified School District et al. v. Newdow et al.*
[49] "McCREARY COUNTY v. AMERICAN CIVIL LIBERTIES UNION OF KY." Legal Information Institute. https://www.law.cornell.edu/supremecourt/text/03-1693.

Eagle Scouts several decades prior. Justice Breyer wrote his own opinion, concurring with the majority. He took a number of different factors into account, such as the monument being a donation and its placement in a large park containing other kinds of historical markers on the grounds surrounding the Texas Capitol. Consequently, he concluded that the monument's message was not primarily religious; rather, it was primarily a secular message of history and morality. He admitted, however, that it was a borderline case.[50]

A case in 2014 also demonstrates the continued ambiguity in the Court's Establishment Clause interpretation. A town in New York state called Greece had been opening its town board meetings with a prayer led by local clergy. Since the majority of religious congregations in the town were Christian, the only clergy who had led prayers from 1999 to 2007 had been Christian. Although the prayers sometimes focused on civic themes, at other times they were distinctly Christian in nature. Two local residents subsequently sued in 2010, asserting that the practice violated the Establishment Clause. Although the Second Circuit Court of Appeals ruled that the Clause had been violated, the Supreme Court reversed that decision in a five to four ruling.[51]

The majority reaffirmed, (as it had in the 1983 case *Marsh v. Chambers*), that legislative prayer was constitutional, since it was a national tradition going back to when the Constitution was ratified. Perhaps more interesting, however, was that the Court ruled that opening a government session with a sectarian prayer was constitutional as long as it did not try to condemn or convert people of another religion and the governing body was indiscriminate in choosing who gave the prayer. Furthermore, the Court's ruling in the case, (*Town of Greece v. Galloway*), asserted that a legislative prayer could not be considered coercive simply because individuals did not want to hear it; as long as they were not forced to participate, the prayer was

[50] "McCREARY COUNTY v. AMERICAN CIVIL LIBERTIES UNION OF KY".
[51] "Town of Greece v. Galloway." Harvard Law Review. November 10, 2014. https://harvardlawreview.org/2014/11/town-of-greece-v-galloway/.

not impermissibly coercive. This seemed in contrast to some of the Court's prior rulings. In *Lee v. Weisman*, for example, the graduation prayer had been ruled unconstitutionally coercive even though those attending were not forced to participate in it.[52]

The U.S. Supreme Court's increasingly narrow rulings on Establishment Clause cases suggests its doctrine in this constitutional area remains unsettled. The variety of reasonings and tests— from the three-part test in *Lemon* to O'Connor's endorsement test to a coercion test to rulings which emphasize history and tradition— further make this issue unclear. Additionally, important considerations, such as the constitutionality of a theological reference in the Pledge of Allegiance, have not been put to rest. It is also important to note the diversity of Establishment Clause cases that continue to come before the Supreme Court— from cases involving prayer in public settings, to those concerning monuments on public property, to cases that concern public funds being provided to religious schools. This steady stream of legal disputes in the federal courts constitutes the clearest sign that constitutional doctrine in this area remains unsettled.

6. California's Supreme Court: A History of Religion and Education Cases

California is notable in a few ways which are important for understanding its religion and education cases. Its Christian population, for starters, is a lesser proportion of the state than the national average, but has a greater proportion of Catholics. In part this is due to the significant number of Catholic hispanics who have historically immigrated there, especially from Mexico. While 70.6% of the U.S. is Christian and 20.8% of those are Catholic, for example, the Christian population in California is 63% of the state with 28% of those being Catholic.[53] This is important

[52] *Town of Greece, New York v. Galloway et al.* (May 5, 2014). https://www.supremecourt.gov/opinions/13pdf/12-696_bpm1.pdf

[53] "Religion in America: U.S. Religious Data, Demographics and Statistics." Pew Research Center's Religion & Public Life Project. September 09, 2020. https://www.pewforum.org/religious-landscape-study/.

to note when it comes to considering cases, since issues involving public funding for private, religious schools often involve Catholic parochial schools.

Additionally, acknowledging California's proximity to East Asia and its history of using the labor of migrants from that region is important for understanding its contemporary religious makeup. As a result, for instance, it has a greater proportion of people from non-Christian faiths than the national average, particularly larger Buddhist and Hindu populations.[54] [55] This consideration is important for cases involving a sectarian prayer, monument, or other issue, since the dominance of Abrahamic religions in the U.S. has been used by the U.S. Supreme Court in its justification of certain practices; for example, the dissenting opinion in *McCreary* regarded the Ten Commandments as essentially non-denominational in the United States, since the vast majority of religious Americans are either Christian, Jewish, or Muslim.

Examining the Supreme Court of California itself is also important for analyzing its rulings. The Supreme Court of California consists of seven justices who are nominated by California's governor. Once appointed, these justices are placed on the ballot every gubernatorial election, where voters decide whether or not to retain them.[56] Whether or not California voters decided to retain a justice is a valuable indicator of the public's satisfaction— or more accurately the public's dissatisfaction— regarding how a justice, and the Supreme Court of California more generally, handled cases. Justices are often, seemingly by default, retained by voters in California; however, this does not invalidate using retention elections as an indicator. If a ruling causes a high degree of dissatisfaction amongst voters, Californians have demonstrated their

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[54] Ernst, Eldon G. "The Emergence of California in American Religious Historiography." *Religion and American Culture: A Journal of Interpretation*, vol. 11, no. 1, 2001, pp. 31–52. *JSTOR*. www.jstor.org/stable/10.1525/rac.2001.11.1.31. Accessed 4 Feb. 2021.
[55] Pew Research Center's Religion & Public Life Project.
[56] Global Reach Internet Productions, LLC - Ames. "American Judicature Society / Judicial Selection in the States - Promoting the Effective Administration of Justice." Judicial Selection in the States. http://www.judicialselection.us/judicial_selection/index.cfm?state=.

willingness to vote justices out. In 1986, for example, three justices—Chief Justice Rose Bird, and Associate Justices Joseph Grodin and Cruz Reynoso— were targeted in their retention elections after ruling against the death penalty in a number of cases. Prior to their retention elections, their opponents aired television commercials in which parents of murdered children denounced the justices for refusing to apply the death penalty to their children's killers. Subsequently all three justices were removed by voters.[57] More recently justices have been targeted for their rulings on abortion.[58] Consequently, the retention of a justice can indicate that their ruling on a given issue was not unpopular enough for them to be voted out. None of the following cases, however, became an issue in any of the justices' retention elections.

One of the first cases regarding religion and education that came before California's Supreme Court since *Engel* involved the use of public funds for a private, religious university. In 1973, California's legislature had created an entity called the California Educational Facilities Authority in order to help private universities in the state develop their educational facilities. The Authority would aid universities by issuing tax-exempt bonds, which would provide these institutions with financing at lower than normal interest rates.[59] In 1974, the year after the Authority was created, the University of Pacific requested to receive such financing from the Authority, but California's Treasurer, Ivy Priest, refused to sell the bonds. The University of Pacific is a private, Methodist institution, and Priest believed that providing government financing for Pacific constituted government support of religion and thus violated the Establishment Clause. When the University of Pacific was refused the funds, it sued, and the

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[57] Lindsey, Robert. "DEUKMEJIAN AND CRANSTON WIN AS 3 JUDGES ARE OUSTED." The New York Times. November 06, 1986. https://www.nytimes.com/1986/11/06/us/elections-story-some-key-states-deukmejian-cranston-win-3-judges-are-ousted.html.

[58] Global Reach Internet Productions.

[59] "Introduction." CEFA Introduction. https://www.treasurer.ca.gov/cefa/introduction.asp.

case *California Educational Facilities Authority v. Priest* made its way before California's Supreme Court.[60]

The Court had to consider not only the U.S. Constitution, but also California's Constitution, which states "No public money shall ever be appropriated for the support of any sectarian or denominational school." [61] State constitutions often have unique, specific provisions not found in the U.S. Constitution, and the constitutionality of the law depended on it meeting this standard.

Justice Stanley Mosk, who wrote the Court's unanimous opinion, had been appointed by a Democratic governor and, perhaps unusual for the time, he did not himself have a religious upbringing. He wrote that the law was constitutional at both the federal and state level. In regards to the U.S. Constitution, the opinion followed the three-part test from *Lemon*, where the U.S. Supreme Court had ruled against a law funding private, religious schools. First, California's Court determined that the law clearly had a secular purpose, since it was aimed at expanding collegiate educational opportunities. Second, it likewise found that the primary effect of the law did not advance or inhibit religion. Third, California's Supreme Court determined that the law did not excessively entangle the government with religion in pursuing this secular purpose.[62] [63]

Additionally, the Court ruled that the law did not violate California's Constitution, since the funding was not for any facilities that would be used in a sectarian way, such as classroom buildings where religious instruction would be held, which it would deem unconstitutional. The

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[60] California Educational Facilities Authority v. Priest.
[61] § 8. Appropriation for sectarian schools; Instruction in denominational doctrines, Cal Const, Art. IX § 8 (Deering's California Codes are current through Chapter 4 of the 2021 Regular Session, including all urgency legislation effective February 22, 2021 or earlier.). advance-lexis-com.proxy.lib.ohio-state.edu/api/document?collection=statutes-legislation&id=urn:contentItem:5JBS-1481-DXC8-22G2-00000-00&context=1516831. Accessed Feb. 5, 2021.
[62] "Stanley Mosk / California Supreme Court History: Justices: CSCHS." California Supreme Court Historical Society. March 14, 2017. https://www.cschs.org/history/california-supreme-court-justices/stanley-mosk/.
[63] California Educational Facilities Authority v. Priest.

Authority was not simply giving public funds to institutions, the Court further noted, it was issuing bonds, and the University still had an obligation to pay the money back. Through this ruling, the Supreme Court of California used the same test crafted by the U.S. Supreme Court in *Lemon* just a few years prior, but permitted the government's funding program.[64]

Later, in 1979, the Supreme Court of California decided the case *Rankins v. Commission on Professional Competence of Ducor Union School District*, which involved a school teacher named Thomas Byars. Byars first started teaching in the Ducor Union School District in 1969, where he taught elementary students. In 1971, just a couple of years after he had begun, Byars joined a church called the Worldwide Church of God. It was a church formed by Herbert Armstrong, a radio and televangelist, whose congregation shared many unorthodox positions. For instance, Armstrong would explain to his followers that most Christians observed the Sabbath on Sunday due to Pagan origins, and that it was wrong to follow this practice. Rather, his followers observed the Sabbath from sundown Friday to sundown Saturday, and congregants did not work during that time. Likewise, congregants refrained from work on many Chrisitan holidays, which the Worldwide Church of God recognized on calendar days that were different from when they were normally observed. [65] [66]

When Byars became a congregant, he requested accommodation from the school district, so that he could be absent on those days. The Ducor Union School District excused Byars from teaching on Friday evenings and would also excuse him on one or two holidays per year. However, Byars insisted on observing more of his Church's observed holidays, and every year he submitted requests to the District for absence on additional days. The District always denied

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[64] California Educational Facilities Authority v. Priest.
[65] Armstrong, H. W. (1976). Ch.2: Who Made and Established the Sabbath. *Which Day Is the Christian sabbath?* Worldwide Church of God.
[66] Rankins v. Comm'n on Prof'l Competence of Ducor Union Sch. Dist.

these requests. Byars, nevertheless, always took these days off, unexcused. He did, however, ensure a substitute teacher would be present on those days, and he prepared lesson plans for the substitute. In March 1973, the District notified Byars that they disapproved of his actions and that, if he continued, he would be terminated from his position. Byars did continue and, consequently, the District notified him at the end of the academic year in 1975 of their intent to dismiss him. A hearing was held before a commission on professional competence, which sided with Byars and determined that his absences did not have a detrimental effect on his students. The commission further reported that firing Byars would violate his rights protected by the U.S. Constitution and by California's Constitution. As a result of this decision, the District sued the commission, and the case made its way before the Supreme Court of California.[67] [68]

The Court sided with the commission, and therefore also with Byars. The ruling, however, was split by a vote of four to three. All four justices in the majority were appointed by Democratic governors; in contrast, two of the dissenting justices were appointed by a Republican governor, Ronald Reagan, and the third dissenting justice was appointed by a Democratic governor. In the opinion, the majority cited California's Constitution, which states that a "person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethic origin." [69] The school district had violated this protection since, the majority determined, it was seeking to disqualify Byars on the basis of his creed. Though his unexcused absences were the basis for his termination, the majority reasoned that forcing his presence on days observed by his religion was, in effect,

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[67] Rankins v. Comm'n on Prof'l Competence of Ducor Union Sch. Dist.
[68] "Rankins v. Commission on Professional Competence." *Justia Law*, law.justia.com/cases/california/supreme-court/3d/24/167.html.
[69] § 8. Employment discrimination, Cal Const, Art. I § 8 (Deering's California Codes are current through Chapter 4 of the 2021 Regular Session, including all urgency legislation effective February 22, 2021 or earlier.). https://advance-lexis-com.proxy.lib.ohio-state.edu/api/document?collection=statutes-legislation&id=urn:contentItem:5JBS-0RV1-DXC8-21GC-00000-00&context=1516831.

discrimination on the basis of religion. Furthermore, the majority claimed accommodating Byars was not a violation of the Establishment Clause in the U.S. Constitution, since the primary purpose of such a practice would not be favoring a religion, but promoting equality among all religions. Lastly, the majority asserted that this was a reasonable accommodation, since there was no difficulty in finding substitute teachers.[70]

The three dissenting justices ruled that the school district had done nothing wrong by seeking to terminate Byars. They argued that California's Constitution protected Byars from being terminated on the basis of his religion, but distinguished that right from a right to accommodation of his religion— which the dissenting justices claimed did not exist. They further held that by accommodating him, the school district would be violating the Establishment Clause of the U.S. Constitution; by accommodating Byars, they reasoned, the district would be respecting the establishment of his religion.[71] This case is notable for its deference to religious rights, and religion generally, which the Court had also exhibited in *Priest*.

In 1981, California's Supreme Court again took a case that, like *California Educational Facilities Authority v. Priest*, involved the issue of religious institutions receiving public funding. A California law had been enacted in 1976, which provided funds so that textbooks used in public schools could be lent to students attending private schools. In effect, these textbooks mostly were loaned to religious, and primarily Catholic, schools. Subsequently a teachers association, concerned that public funds were going to private, religious schools rather than public ones, challenged the constitutionality of the law. California's Supreme Court did not rule on the constitutionality of the issue as pertaining to the U.S. Constitution, citing the U.S. Supreme Court's unclear stance on the issue; rather, it focused on whether the law was

[70] Rankins v. Comm'n on Prof'l Competence of Ducor Union Sch. Dist.
[71] Rankins v. Comm'n on Prof'l Competence of Ducor Union Sch. Dist.

constitutional under California's Constitution, which forbids using public funds for religious schooling.[72]

In a unanimous opinion, the Supreme Court of California ruled that the law was unconstitutional with regards to California's Constitution. The Court determined that the law directly provided public money to religious schools, and therefore violated California's explicit constitutional provision barring such practices. Importantly the Court distinguished this case, *California Teachers Association v. Riles*, from *Priest*. In the latter, the Court argued that aid was being provided only to universities where students were not required to receive religious instruction and public money was not being directly given. Therefore, according to the Court, that case was different, and California's Constitutional provision had not been violated.[73] The ruling in *Riles* was thereby consistent with the Court's earlier rationale on this issue, but did demonstrate some of the limits in terms of what was constitutionally permissible in this area of law.

In 1991, the Supreme Court of California reviewed a case similar to *Lee v. Weisman*, which the U.S. Supreme Court would decide soon after. The case involved Morongo Unified School District, which operated four schools, each of which included prayers during their graduation ceremonies. The individual schools each independently decided who would speak at their graduation ceremonies, but all of the schools had either a Catholic priest or a Protestant minister giving the prayer. The prayers themselves often included references to a "heavenly Father" or "the Lord." Two residents in the district, Jim Sands and Jean Bertolette, requested that Morongo stop having prayers at graduation ceremonies. However, the school district refused to stop the practice and, as a consequence, Sands and Bertolette sued. By selecting graduation

[72] Cal. Teachers Ass'n v. Riles.
[73] Cal. Teachers Ass'n v. Riles.

prayers and clergy to recite them, the plaintiffs argued that Morongo had unconstitutionally entangled government and religion, violating the Establishment Clause and California's Constitution.[74]

California's Supreme Court ruled five to two in this case, *Sands v. Morongo Unified School District*, that the graduation ceremony prayer violated the Establishment Clause in the U.S. Constitution. The Supreme Court of California made this ruling as *Lee v. Weisman* was being decided by the U.S. Supreme Court— which would ultimately rule the same way. The five justices in the majority in *Sands* each wrote separate opinions, but each agreed that graduation prayers did not pass the U.S. Supreme Court's three-part test in *Lemon*: the prayers' primary effect was conveying a message that favored religion, and the District's involvement in selecting the prayer and speakers excessively entangled government and religion. Chief Justice Malcolm Lucas, who was in the majority and wrote a concurring opinion, also noted the degree of ambiguity existent at the federal level in this area of law, writing that "recent United States Supreme Court decisions [make clear that] the law is in a state of flux in this area." [75]

Amidst federal ambiguity, one might expect states to lean more towards interpreting their state constitutions on a given matter, since they have freedom in interpreting their state constitution; therefore it might come as a surprise that the majority in this case decided not to rule on the constitutionality of the graduation prayers under the Californian Constitution, despite it having an establishment clause almost identical to the federal one. A couple of justices in the majority thought that California's constitutional provision had been violated, but more thought it

[74] "Stanford Law School - Robert Crown Law Library." Supreme Court of California. https://scocal.stanford.edu/opinion/sands-v-morongo-unified-school-dist-31258.
[75] "Stanford Law School - Robert Crown Law Library."

prudent to only answer the federal question— since the prayer violated the federal constitution, there was no need to reach the state constitutional issue.[76]

The most recent case involving religion and education to come before California's Supreme Court is *California Statewide Communities Development Authority v. All Persons Interested etc*., which the Court decided in 2007. Unlike the previous cases that came before the Court, this one was not initiated by an actual dispute between two parties. Rather, the California Statewide Community Development Authority wanted to issue tax-exempt bonds to help finance religious schools and filed a petition asking the courts to validate the transaction. By issuing these bonds, religious schools would save millions of dollars in building their educational facilities.[77] California's Supreme Court noted that this case was different from *California Educational Facilities Authority v. Priest*, however, because this case involved schools that were "pervasively sectarian," whereas the university in *Priest* was simply religiously affiliated. One of the schools involved in *California Statewide Communities Development Authority v. All Persons Interested etc*., for example, admitted students based, in part, on their church involvement, and the other two schools involved in the case required faculty members to adhere to a Christian faith.[78]

The Supreme Court of California primarily focused on the constitutionality of the bond issuance under California's Constitution, which prohibits appropriating public funds for religious schooling. The Court was split on this matter. In a vote of four to three, it ruled that the bond issuance would not violate California's Constitution. The degree to which a school was religious in nature, the majority wrote, was not a determining factor with regards to the constitutionality of

[76] Sands v. Morongo Unified School Dist.
[77] "California Statewide Communities Development Authority v. All Persons Interested in the Matter of the Validity of the Purchase Agreement: ACLU of Northern CA." ACLU of Northern California. April 07, 2005. https://www.aclunc.org/our-work/legal-docket/california-statewide-communities-developement-authority-v-all-persons.
[78] California Statewide Communities Development Authority v. All Persons Interested etc.

the bond issuance under California's Constitution. Rather, what mattered was that the school offered a broad curriculum with enough secular subjects to facilitate the government's goal of advancing secular education— whether or not religion benefited incidentally was unimportant. As in *Priest*, the Court ruled that schools could not use the money received from the bond issuance to construct facilities that would be used for religious purposes. Additionally, the Court noted that in issuing tax-exempt bonds, the government was not actually providing money to the schools— it was simply providing them with a cheaper way to borrow funds. The three dissenting justices, in contrast, argued that California's Constitution was clear: *no* aid could be used to support a school controlled by a sectarian institution. In their minds, California's Constitution was unambiguous, and issuing the bonds to aid religious institutions was unconstitutional.[79]

An additional case outside the realm of education, *Fox v. Los Angeles,* concerned the Establishment Clause, and it is important to note. Los Angeles city officials had permitted the display of a cross at city hall during Christmas and Easter holidays for over thirty years. Eventually, residents of the city sued, claiming the display violated the Establishment Clause and California's own constitutional provisions. In 1978, the case made its way before California's Supreme Court— six years before the U.S. Supreme Court ruled on the constitutionality of the nativity scene in *Lynch v. Donnelly*. In deciding the case, the Supreme Court of California acknowledged that the U.S. Supreme Court had treated Establishment Clause cases with a "perplexing diversity of views," and chose to only examine whether the display violated California's constitutional provisions. California's Constitution has an almost verbatim establishment clause: "The [Californian] Legislature shall make no law respecting an

[79] California Statewide Communities Development Authority v. All Persons Interested etc.

establishment of religion."[80] With regards to its own constitution, the Court found that the display was unconstitutional, since it considered the practice an action that respected the establishment of Christianity; additionally, the Court found that the government had not been practicing a position of neutrality, which the Court deemed necessary under California's Constitution.[81]

7. Ohio's Supreme Court: A History of Religion and Education Cases

Generally speaking, Ohio's religious makeup is similar to that in the rest of the country, though a slightly greater proportion of its Christian population is Protestant and slightly lesser proportion is Catholic.[82] Also noteworthy is that Ohio has the second largest Amish population in the country, and up until 2000, had the largest in the country.[83] [84] Ohio's location in the Midwest and its more conservative electorate are also notable factors that differentiate the Buckeye state from California and Virginia for the purpose of examining religion and education cases. Additionally important, Ohio's Supreme Court is composed of seven justices who are elected on a nonpartisan ballot to six year, renewable terms. None of the cases that will be discussed became a point of issue for a justice seeking re-election. Furthermore, the Governor of Ohio only plays a role in selecting justices when there is a vacancy on the Court.[85]

The first case regarding religion and education that came before the Supreme Court of Ohio after *Engel* was *Protestants & Other Americans United for Separation of Church & State v. Essex* in 1971. Ohio's Department of Education had been distributing money to private schools

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[80] § 4. Religion, Cal Const, Art. I § 4 (Deering's California Codes are current through Chapter 4 of the 2021 Regular Session, including all urgency legislation effective February 22, 2021 or earlier.). https://advance-lexis-com.proxy.lib.ohio-state.edu/api/document?collection=statutes-legislation&id=urn:contentItem:5JBS-0RV1-DXC8-21G1-00000-00&context=1516831.

[81] Fox v. Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867, 1978 Cal. LEXIS 321 (Supreme Court of California December 15, 1978 ). https://advance-lexis-com.proxy.lib.ohio-state.edu/api/document?collection=cases&id=urn:contentItem:3S11-S280-003C-R0WH-00000-00&context=1516831.

[82] "Religion in America: U.S. Religious Data, Demographics and Statistics."

[83] Amish Studies. August 26, 2020. http://groups.etown.edu/amishstudies/statistics/statistics-population-2020/.

[84] Kraybill, D. B. (1989). *The riddle of Amish culture*. Baltimore, MD.: Johns Hopkins University Press.

[85] "The Supreme Court of Ohio & The Ohio Judicial System." Justices of the Supreme Court of Ohio. http://www.supremecourt.ohio.gov/SCO/justices/default.asp.

in order to help fund the education and care of deaf and disabled students. The money was used for secular purposes, such as providing testing and counseling programs, audio and visual aids, and services for physically handicapped students. However, funds were granted to religious schools and, as a result, the group Protestants and other Americans United for Separation of Church and State sued the state government. This organization had been created in 1947 to combat government support of religious education.[86] In addition to deciding whether Ohio's Department of Education had violated the Establishment Clause, the Supreme Court of Ohio also had to consider whether one of Ohio's Constitutional provisions had been violated. Ohio's Constitution states that "no religious or other sect… shall ever have any exclusive right to, or control of, any part of the school funds of this state.[87] [88]

In its ruling, the Supreme Court of Ohio determined that Ohio's Department of Education had not violated Ohio's Constitution nor the Establishment Clause in the U.S. Constitution. The Court was unanimous in its opinion. Ohio's Department of Education had not violated Ohio's Constitution, according to the ruling, since the mere fact that some religious schools incidentally benefited did not mean the schools had an exclusive right to or control over any part of the school funds of the state. Moreover, the Supreme Court of Ohio determined the Establishment Clause had not been violated, since the materials and services funded were not used for a religious purpose and the funding did not excessively entangle government and religion. Looming over the Court, however, was the recently decided *Lemon* case, where the U.S. Supreme Court struck down a law that provided funds to parochial schools.

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[86] "Our History." Americans United for Separation of Church and State. https://www.au.org/about/our-history.
[87] § 2 School funds., Oh. Const. Art. VI, § 2 ( Current through January 1, 2021 ). https://advance-lexis-com.proxy.lib.ohio-state.edu/api/document?collection=statutes-legislation&id=urn:contentItem:5D3J-JVM1-705K-R4NR-00000-00&context=1516831.
[88] Protestants & Other Americans United for Separation of Church & State v. Essex.

The Supreme Court of Ohio distinguished *Lemon* from this case, however, arguing that that case involved a far greater degree of entanglement between church and state. In *Lemon*, for example, the law required the government to extensively audit and inspect data from the parochial schools. Furthermore, public funds had been used to pay for teachers in the parochial schools, and an excessive entanglement of government and religion had been required to ensure those teachers' 'religious neutrality.' In these ways Ohio's Supreme Court differentiated *Lemon* and subsequently ruled in a manner that, in contrast, upheld the government's use of funds. [89]

Another case, *State v. Whisner*, involved education and free exercise of religion issues, and it came before Ohio's Supreme Court in 1976. The case concerned a group of parents who had sent their children to Tabernacle Christian School, a private, religious school in Bradford, Ohio. The school was led by born again Christians, who believed deeply in teaching detachment from worldly, sinful desires such as gambling or drinking. As a result, the school promised to provide students with a strong moral and spiritual foundation— something that attracted many of the parents involved in the case to the school. Importantly, Tabernacle Christian School sought to achieve this goal by allocating a portion of school time to Bible studies and spiritual training. In trying to carve out time for this purpose, however, the school was faced with a challenge. Ohio's Board of Education had prescribed strict minimum standards to which all schools, public and private, had to adhere; one requirement was that schools had to allocate instructional time so that four-fifths of instructional time was used for teaching core subjects, such as mathematics, language-arts, social studies, and science, and one-fifth was used for subjects such as physical education, music, or art.[90] [91]

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[89] Protestants & Other Americans United for Separation of Church & State v. Essex.
[90] *State v. Whisner.*
[91] Carper, J. (1982). The Whisner Decision: A Case Study in State Regulation of Christian Day Schools. *Journal of Church and State, 24*(2), 281-302. Retrieved March 9, 2021, from http://www.jstor.org/stable/23916829

Consequently, this proportional standard did not allow time for instruction in religious training, and thus greatly restricted the extent to which the school could engage in such teaching. Tabernacle Christian School, as a result, did not follow the state's standards, and it was not accredited. Thereafter, the state sued a group of parents who had sent their children to the school, citing their failure to send their children to a school that met the state's minimum standards. The parents, in their defense, claimed that those standards violated their First Amendment rights under the U.S. Constitution, which protects the free exercise of religion, and their rights under Ohio's Constitution, which similarly protects one's freedom of conscience and of worship. Ultimately the issue came before Ohio's Supreme Court.[92] [93]

The Supreme Court of Ohio ruled four to two, (with the Chief Justice not participating), that Ohio's minimum education standard had violated the parents' rights under the U.S. Constitution and Ohio's Constitution. The rationale employed by the Court was the same for both constitutions. The minimum education standard, the majority ruled, had gone too far in restricting religious schools and parents' ability to practice their religion; the Court importantly decided, for example, that religious rights can only be restricted if there is no other reasonable way to achieve the State's secular goal. Ohio's Department of Education, according to the Court, failed to demonstrate that a less religiously restrictive standard that also met the state's secular educational goal could not be applied.[94]

In 1999, the case *Simmons-Harris v. Goff* would once more present Ohio's Supreme Court with a constitutional question regarding public funds going towards religious schools. Ohio's General Assembly had passed an appropriations bill which, in part, established a school voucher program called the Pilot Project Scholarship Program. The legislature created the

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[92] *State v. Whisner.*
[93] § 7 Rights of conscience; education; necessity of religion and knowledge., Oh. Const. Art. I, § 7.
[94] *State v. Whisner.*

program in order to aid students in Cleveland's failing school district. At the time there was a national push for school choice, which was increasingly heralded by Republican politicians and religious leaders as the best way to save students in failing school systems, particularly those in urban areas. This solution faced opposition, however, notably from teachers unions and congressional Democrats.[95] [96]

The pilot program gave up to $2,250 to families based on need, so that they could pay to have their child attend a participating private school of their choice instead of the local public school. Although Ohio was not the first state to enact such a program, it was the first to allow religious schools to participate. Importantly, religious schools participating in the program could not refuse a student based on their religious, or non-religious, beliefs. Many who opposed this program highlighted the fact that public funds were, perhaps unconstitutionally, going towards religious schooling; more troubling to some, however, was that *most* of the families in the program opted to send their children to religiously affiliated schools. Consequently, the ACLU sued the state of Ohio, alleging that the voucher program violated Ohio's Constitution and the Establishment Clause in the U.S. Constitution. Eventually the case made its way before Ohio's Supreme Court.[97]

In its decision, the Supreme Court of Ohio first acknowledged the ambiguity existent in the U.S. Supreme Court's Establishment Clause doctrine, particularly pointing to the fact that some justices on the U.S. Supreme Court had challenged the test used in *Lemon*. Nevertheless, Ohio's Supreme Court used *Lemon* as a framework. Using this method, the Court found Ohio's voucher program passed all three requirements, deeming it constitutional under the U.S.

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[95] "ZELMAN V. SIMMONS-HARRIS: Encyclopedia of Cleveland History: Case Western Reserve University." Encyclopedia of Cleveland History | Case Western Reserve University. May 12, 2018. https://case.edu/ech/articles/z/zelman-v-simmons-harris.

[96] *Simmons-Harris v. Goff.*

[97] "ZELMAN V. SIMMONS-HARRIS: Encyclopedia of Cleveland History.

Constitution. First, the Court found it had a secular legislative purpose, which was to further Cleveland students' educational opportunities. Second, the primary effect of the legislation was not religious, the Court ruled, since the government was providing funds to parents and any support provided to religious schools occurred indirectly through the parents.[98]

For this same reason the Court decided that, thirdly, the legislation did not excessively entangle government and religion, since the support was indirect. Likewise, Ohio's Supreme Court determined that the fact that most families chose to send their children to religious schools did not violate the Establishment Clause since, regardless of the effect, the program itself favored neither religious nor secular schooling.[99]

In terms of the provisions regarding religion in Ohio's Constitution, the Supreme Court of Ohio decided to adopt the *Lemon* test. Even though states are not bound by the U.S. Supreme Court when deciding state constitutional law, Ohio's Supreme Court decided the test in *Lemon* was logical and useful, and therefore used it when ruling on the religious provisions in Ohio's Constitution. Consequently, they found the program did not violate the provisions regarding religion in Ohio's Constitution. Ohio's Supreme Court did, however, find the program unconstitutional under a rather obscure provision in Ohio's Constitution. In Article II of Ohio's Constitution, there is a provision requiring that bills cannot contain more than one subject— in practical effect, this means that the legislature cannot pass bills with sections that are entirely unrelated from one another. Under this provision the program failed since, the Court noted, it was written in an appropriations bill that also concerned, among other things, the residency of elected officials, government contracts, and the financial statements of political candidates. In

[98] *Simmons-Harris v. Goff.*
[99] *Simmons-Harris v. Goff.*

other words, as the Court put it, there was a " considerable disunity in subject matter." [100] As a result, the legislation creating the school voucher program was deemed unconstitutional.

The case *Freshwater v. Mount Vernon City School District Board of Education*, which came before Ohio's Supreme Court in 2013, is the most recent case involving religion and education to come before the Court, and it is also one of the most unusual. The case concerned John Freshwater, an eighth-grade science teacher who, in addition to other topics, taught the theory of evolution to his students. Freshwater was known as one of his school district's best science teachers, and his students consistently received some of the highest scores on the science section of the state's standardized tests, which included the topic of evolution. When teaching his students evolution, however, Freshwater often initiated discussions of creationism and intelligent design— concepts which use divine explanations to account for genetic diversity in biology. Freshwater himself was deeply religious, and he gave students pamphlets discussing creationism and provided extra credit to students who attended creationist seminars. Allegedly, Freshwater also made comments to his students denigrating the theory of evolution, asserting it was not supported by the Bible.[101] [102]

Complaints regarding Freshwater's teaching had come before the school as early as 1994, however, legal action first arose when Freshwater used a Tesla coil, which conducts electricity, to create a temporary mark on a student's arm during a class demonstration. The student's family complained, and alleged that the mark was a cross, though Freshwater claimed it was the letter x. Regardless, the family threatened legal action and demanded that Freshwater remove religious paraphernalia he had in his classroom, including a Bible on his desk and a poster of the Ten

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[100] *Simmons-Harris v. Goff.*
[101] *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*
[102] "Freshwater v. Mount Vernon City School District Board of Education." Americans United for Separation of Church and State.
https://www.au.org/our-work/legal/lawsuits/freshwater-v-mount-vernon-city-school-district-board-of-education.

Commandments on the wall. Subsequently, the school called for Freshwater to stop teaching religion in the classroom, and the principal told Freshwater that he had to remove religious items in the classroom from the sight of students. Freshwater continued to teach creationism; he did, however, remove the items, but soon thereafter he checked out two books from the school's library— the *Oxford Bible* and *Jesus of Nazareth*— which he placed on his desk as an act of defiance. Accordingly, hearings were held and Freshwater was fired for failing to adhere to the school's curriculum and for being insubordinate. In turn, Freshwater appealed the decision, and the case eventually made its way to Ohio's Supreme Court.[103]

Through the case, two important constitutional questions were presented to the Court: did Freshwater's teaching of creationist concepts and placement of religious items in the classroom violate the Establishment Clause, and did his firing violate the First Amendment's provision regarding the free exercise of religion? With respect to the first question, the Court held that Freshwater's placement of religious items on his desk did not violate the Establishment Clause, since it was his personal space and could not be reasonably interpreted by students as the school's endorsement of religion; the Court did not consider the placement of the Ten Commandments, since Freshwater had taken it down in compliance with the school's orders, and it was no longer part of the dispute. Although Freshwater had a right to keep religious items on his desk, the Court ruled that he had placed the *Oxford Bible* and *Jesus of Nazareth* books on his desk as an act of insubordination, and therefore his termination was justified. As a result, the ruling found it unnecessary to consider whether Freshwater's teaching of creationism had violated the Establishment Clause.[104]

Four justices formed the majority, though one of them wrote a separate, concurring

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[103] *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*
[104] *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*

opinion which, in contrast, held that Freshwater's placement of religious items in the classroom *did* violate the Establishment Clause. The three dissenting justices disagreed with the majority that Freshwater's termination was justified. In their view, he had not been insubordinate, since the school's demand that he remove his religious items was unconstitutional. Freshwater's actions could not be interpreted as insubordinate, they argued, since he was going against an invalid order. As a result, the three dissenting justices considered whether his teaching violated the Establishment Clause. The justices cited student accounts that Freshwater had encouraged students to critically examine evolutionary theory and argued that making comments or providing handouts involving creationism did not constitute teaching it. As a result, Freshwater's teaching did not violate the Establishment Clause, and his termination was unjustified in their view.[105]

These are all of the cases regarding the Establishment Clause, not just religion and education cases, that the Supreme Court of Ohio has ruled on since *Engel*.

8. Virginia's Supreme Court: A History of Religion and Education Cases

Virginia's religious makeup is noticeably similar to the national makeup, except for the fact that a great proportion of the state's population is Protestant, 58% compared to the national average of 46.6%, and its proportion of Catholics is smaller, 12% compared to the national average of 20.8%.[106] With regards to the Supreme Court of Virginia's composition, it has seven justices who are each appointed to twelve-year terms, and they can be re-appointed perpetually, though they must retire after their seventy-third birthday. Rather than being appointed by the governor, as in some states, Virginia's justices are chosen by a majority vote of each house in

[105] *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*
[106] "Religion in America: U.S. Religious Data, Demographics and Statistics."

Virginia's general assembly. Importantly, none of the justices' Establishment Clause interpretations became a point of issue in their retention.[107]

The first case regarding education and religion that came before Virginia's Supreme Court after *Engel* involved a bill passed by Virginia's General Assembly in 1972. Virginia had offered tuition assistance programs to students in public universities in the state. However, this bill, in part, appropriated funds for a loan program that could be used by students attending private universities— including religious ones. The loans were repayable in two ways. Students could, of course, pay them back with money, but the loans were also considered "repaid" if students made sufficient academic progress. This latter form was considered repayment in academic work. The comptroller of Virginia, David Ayres, doubted the legality of this program. For starters, Virginia's Constitution only permitted aid in the form of loans to students attending universities, and Ayres questioned whether loans repayable in academic work fit into the traditional definition of a loan. Furthermore, Virginia's Constitution only allowed public funds to go towards non-sectarian institutions; Ayres consequently reasoned that loans provided to students attending religiously affiliated universities violated this provision, as well as the Establishment Clause in the U.S. Constitution.[108]

The Supreme Court of Virginia ruled unanimously, deciding the bill did not violate the Establishment Clause but did violate Virginia's constitutional provisions. With regards to the Establishment Clause, the Supreme Court of Virginia used the U.S. Supreme Court's decision in *Schempp* as a framework. Virginia's Supreme Court found that the bill had a secular purpose— expanding secular educational opportunities— and that this secular purpose was evidenced by the fact that loans were not provided for religious or theological training. As a result, the Court

[107] "Virginia Law." Constitution of Virginia. https://law.lis.virginia.gov/constitution
[108] *Miller v. Ayres, 213.*

also determined that the primary effect of the bill was secular, not religious. Furthermore, the nature of providing loans did not, the Court argued, excessively entangle the government with religion.[109]

However, the Supreme Court of Virginia found that the bill violated Virginia's Constitution, since it considered the loans that were repayable through academic work as being closer to conditional gifts or grants than actual loans. Consequently, the Court decided that this violated the state's constitutional provision, which only allowed for funding in the form of loans. The Court also ruled that sending grants to sectarian institutions violated the state's constitutional provision, which only permitted funding that was appropriated for non-sectarian educational institutions.[110]

Soon after the Court's decision, Virginia's General Assembly passed the same legislation, but amended it so that instead of offering the option of repayment in academic work, it allowed for repayment in five alternative ways after graduation: U.S. military service, residing in Virginia and working for the state government, residing in Virginia and working for an organization engaged in non-profit work, and residing in Virginia and working, generally, or not working, both of which had longer time frames of repayment than the other options. Virginia's comptroller, however, refused to issue payment for the program until the new legislation was adjudicated, and it came before the Court once more. One of the central issues before the Court was that Virginia's constitution allowed for loans to be repaid either in the form of money or in the form of public service to the state of Virginia. The Court had not considered academic progress as service to Virginia, but the legislature hoped it would interpret these new alternatives in this way, arguing that each one of them benefitted the state.[111]

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[109] *Miller v. Ayres, 213.*
[110] *Miller v. Ayres, 213.*
[111] *Miller v. Ayres, 214.*

Therefore the Court had to determine whether the legislature's five alternative methods of repayment counted as public service; if not, the Court would view the legislation as providing grants rather than loans, and it would be deemed unconstitutional. In its second ruling on this legislation, the Court determined that four of the five alternative repayment options could not be considered public service to Virginia in the sense meant when the constitutional provision was ratified. Only residing in Virginia and working for the state's government, the Court ruled, could count as public service eligible as a form of repayment. Therefore, individuals pursuing any form of repayment other than paying the loan back in money or working for Virginia's government were viewed in the eyes of the Court as receiving a grant.[112]

Virginia's Supreme Court, consequently, struck down these parts of the loan program. However, the new bill had a severability clause. Therefore, the Court upheld loans that were repaid in money or through residence and work for the state government. This included loans to sectarian universities since loans were not considered, according to Virginia's Supreme Court, as impermissible public funding for sectarian schools. All in all the Supreme Court of Virginia, through these complex means, carved out a workable interpretation of the state constitution for this legislation, which allowed state loans to go towards religious universities.[113]

In 1991, the Supreme Court of Virginia once more ruled on the constitutionality of public funding going towards religious institutions. The city of Lynchburg's Industrial Development Authority had approved a bond issuance that would allow Liberty University to build and expand its educational facilities. Liberty University was founded by Jerry Falwell, a televangelist and a vocal conservative, and a strong religious culture permeated its university life. Students and faculty, for example, were required to attend religious services. Students lived in dormitories

[112] *Miller v. Ayres, 214*
[113] *Miller v. Ayres, 214.*

which had several faith leaders and attendance at weekly dormitory prayer meetings was mandatory. In addition to other religious commitments required by students and faculty, the university itself had a religious based mission statement.[114]

In deciding the case, *Habel v. Industrial Development Authority*, the opinion of Virginia's Supreme Court was unanimous and straightforward: the bond issuance violated both the Establishment Clause in the U.S. Constitution and Virginia's constitutional provisions. Given Liberty University's overwhelmingly religious nature, the Court ruled, government support for the institution would impermissibly entangle government and religion. Notably, the Supreme Court of Virginia decided to apply this reasoning in interpreting Virginia's constitutional provision as well. Virginia's Constitution contains an extensive provision regarding separation of church and state, and the wording regarding the establishment of religion is distinct from the federal constitution: "the General Assembly shall not… confer any peculiar privileges or advantages on any sect or denomination."[115] Regardless of the wording, Virginia's Supreme Court could interpret its own constitution's establishment clause differently from the federal interpretation, and yet it decided to adopt the U.S. Supreme Court's method, writing "we find the Supreme Court's construction of the Establishment of Religion Clause of the First Amendment… helpful and persuasive in this case in construing the analogous state constitutional provision."[116]

The most recent case regarding religion and education, *Virginia College Building Authority v. Lynn*, was very similar to *Habel*. It came before the Supreme Court of Virginia in 2000. The Virginia College Building Authority had approved the issuance of bonds, which would benefit Regent University. Like Liberty University in *Habel*, Regent University was deemed

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[114] *Habel v. Industrial Dev. Authority.*
[115] *Habel v. Industrial Dev. Authority.*
[116] § 16. Free exercise of religion; no establishment of religion, Va. Const. Art. I, § 16 (Current through the 2020 Special Session I of the General Assembly and Acts 2021, cc. 1 and 2.). https://advance-lexis-com.proxy.lib.ohio-state.edu/api/document?collection=statutes-legislation&id=urn:contentItem:6233-2BY1-FFFC-B1DY-00000-00&context=1516831.

"pervasively sectarian" for the religious commitments it required from students and faculty, and its Christian based mission statement. The Supreme Court of Virginia, however, acknowledged that the U.S. Supreme Court's doctrine regarding public funds and religious institutions had changed since the *Habel* case involving Liberty University in 1991. In 1997, the U.S. Supreme Court had shifted its prior strict separation stance regarding government involvement with religious universities in the case *Agostini v. Felton*. In that case, the U.S. Supreme Court had ruled on a program where public school teachers in New York taught in religious schools, deeming it constitutional as long as their lessons were secular and religiously neutral in nature. The U.S. Supreme Court's decision was split five to four and overturned their prior ruling which invalidated the same program; in making their decision in *Agostini*, the U.S. Supreme Court decided that government aid could constitutionally be given to a religious institution if the government was providing the aid for a secular purpose.[117] [118]

As a consequence, the Supreme Court of Virginia determined that the issuance of bonds for Regent University was constitutional with regards to the Establishment Clause in the U.S. Constitution and Virginia's similar state constitutional provision. Though Regents was a sectarian university, the government's purpose in issuing the bonds was to aid in the development of educational facilities that would be used for its secular curriculum; importantly, Virginia's Supreme Court asserted that bonds could not be issued for Regent's Divinity School, since the state constitution explicitly prohibited aiding religious training or a theological education.[119]

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[117] *Virginia College Bldg. Auth. v. Lynn.*
[118] "Agostini v. Felton, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)." Legal Information Institute. June 23, 1997. https://www.law.cornell.edu/supct/html/96-552.ZS.html.
[119] *Virginia College Bldg. Auth. v. Lynn.*

These are all of the cases regarding the Establishment Clause, not just religion and education cases, that the Supreme Court of Virginia has ruled on since *Engel*.

9. Conclusion

Perhaps the most notable feature of this history of cases involving religion and schools, and the Establishment Clause generally, is the predominance of issues concerning public funds and religious schools—at least in regards to the state supreme courts in California, Ohio, and Virginia. Certain cases such as *Rankins*, *Morongo,* and *Freshwater* concern other Establishment Clause issues; for the most part, however, these issues appear as outliers as the focus regarding religion and education has trended towards school funding issues. The first Supreme Court case in which the Court incorporated the Establishment Clause against the states— *Everson*— also dealt with religion and school funding issues. In that case the Supreme Court had permitted funding for the transportation of students to private, religious schools. The Court had made it clear, however, that it interpreted the Establishment Clause as requiring a strict, absolute separation of church and state— a stance which became realized in *Engel*.[120] The specific ruling in *Engel* has remained very much intact; recent rulings at the federal and state level regarding religion and school funding issues, however, have been more permissive in their language regarding the separation required between church and state. It is important to note, for example, that California, Ohio, and Virginia have all permitted some form of state funding to religious, educational institutions, (as has the U.S. Supreme Court).

The extent to which these state supreme courts have and have not constructed unique interpretations of their state constitutions in this area is also noteworthy. The supreme courts in these states have each articulated specific doctrines, particularly with regards to public funds and sectarian institutions, that are based on unique provisions and restrictions in their state's

[120] *Everson v. Board of Education.*

constitution. Moreover California's Supreme Court, in *Fox v. Los Angeles*, demonstrated a willingness to develop its state constitutional doctrine in the midst of federal ambiguity with regards to the Establishment Clause.

At other times, however, the state supreme courts have— perhaps more often— simply followed the U.S. Supreme Court's interpretations in coming up with their own state constitutional interpretations. In *Morongo*, for instance, California's Supreme Court acknowledged the variance in the U.S. Supreme Court's Establishment Clause rulings at the time, but only attempted to decide the case with regards to the U.S. Constitution— abdicating the chance to develop its own state constitutional doctrine on the issue. For those who want lawyers, judges, and the public to look more to state constitutions and state supreme courts, an important question is whether state supreme courts themselves are inclined to initiate state-level solutions in specific areas of constitutional law, especially when the U.S. Constitution and the relevant state constitution contain similar provisions.

In terms of variance among the state supreme courts, it is difficult to discern distinct patterns in their judicial interpretations. Ohio's history of cases shows a state supreme court that has been protective of religion; even in *Freshwater*, where the Supreme Court of Ohio validated Freshwater's termination, the Court defended his right to display religious items in the classroom, and the dissenting justices were protective of his remarks and actions regarding creationism. California, on the other hand, has a less straightforward record, yet it also dealt with issues that did not come before Ohio's Supreme Court, such as graduation prayer— and it was protective of the religious rights of another teacher, Thomas Byars. The Supreme Court of Virginia, furthermore, only had cases involving public funds and religious schools. It may be possible, nevertheless, to regard Ohio's Supreme Court as having more consistent rulings

concerning public funds and religious schooling issues in particular. The Supreme Court of Ohio and the Supreme Court of Virginia have also not had cases involving public aid going towards religious schools in over twenty years; this may suggest these two courts have been more successful than the Supreme Court of California and the U.S. Supreme Court in resolving this issue.

However, it is probably too difficult to claim that any of the three state supreme courts have a noticeable pattern of ruling in a way that exhibits tailoring to their respective populations in this area of law. California, for example, has had no non-Christian Establishment Clause cases despite having a relatively higher proportion of non-Christian religions. This might, nonetheless, provide insight into how religion and education cases, and church and state issues generally, will develop going forward at the federal level; for example, despite the growth of non-Christian religious populations in the U.S. in modern American society, Establishment Clause cases, and separation of church and state cases broadly, might not reflect those changes if the population sizes remain low enough. California's history of cases may also be more reflective of its growing, predominantly Catholic, Latino population. Furthermore, certain issues such as the phrasing of the Pledge of Allegiance, have not been resolved by state supreme courts nor the U.S. Supreme Court and could resurface, (though that seems unlikely under the Roberts Court). Despite these uncertainties, a state-level perspective seems to at least suggest that the debate regarding public funds going towards religious schools will likely continue for the foreseeable future.

Though the histories of California, Ohio, and Virginia in this constitutional area do not provide a clear indication of the efficacy of state supreme courts in tailoring decisions to their state's population nor experimenting with novel constitutional solutions, they do suggest state

supreme courts may be effective in resolving the issues that have come before them in this area. The fact that the state supreme courts in Ohio and Virginia, for example, have not had new cases regarding religion and education, (with the exception of Freshwater), in over twenty years might indicate their prior rulings in this area were clear enough not to require further rulings. This seems significant given the continuation of cases regarding religion and education, and the separation of church and state generally, that come before the U.S. Supreme Court. Admittedly, the limited number of states examined does not allow for any definitive conclusions; in addition to providing a state-level account of this constitutional issue, however, hopefully these findings support the need for further scholarship— regarding this constitutional area, specifically, as well as the examination of state supreme courts more generally.

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